



Strasbourg, 7 April 2008

CDL-AD(2008)010

Opinion No. 420 / 2007

Or. Engl./Fr.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**OPINION ON THE CONSTITUTION
OF FINLAND**

**adopted by the Venice Commission
at its 74th plenary session
(Venice, 14-15 March 2008)**

**on the basis of comments by
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Introduction

1. Further to a request by the Finnish Ministry of Justice, the Venice Commission was involved in the evaluation of the Constitution of Finland, dated 11 June 1999. This evaluation process may lead to a constitutional revision.

2. In this context, a delegation of the Venice Commission paid two visits to Finland. During the first visit, on 7-8 June 2007, it met in particular with the Minister of Justice and representatives of the Office of the President of the Republic as well as of the Supreme Administrative Court. It then took part in a seminar at the University of Turku, which focused on human rights, and more specifically the role of international treaties in the field of human rights.

3. Further to this visit, individual comments were drafted by the rapporteurs, Messrs Sergio Bartole, Iain Cameron, Pieter van Dijk, Olivier Dutheillet de Lamothe, Michael Jensen, and Peter Paczolay (CDL(2007)083, 074, 075, 076, 091, 097).

4. A second visit took place on 28 January 2008, which was mostly dedicated to the role of the Prime Minister and European and international relations.

5. The present opinion is based on the individual comments mentioned above, and takes into account the information received during the visits to Finland and a number of documents provided by the Finnish authorities. These include the Memorandum on the evaluation and follow-up study of the Constitution of Finland (CDL(2006)095), and a note introducing the main issues to be discussed (dated 12 March 2007), both by the Ministry of Justice; notes on the background to and the future of the Finnish Constitution, on the tasks of the constitutional law committee, on the first amendments to the Constitution and on the current debate as to "why there is no constitutional Court in Finland".

6. The present opinion was adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

7. The opinion addresses issues raised by the Finnish Ministry of Justice in its note of 12 March 2007, namely the referendum and popular initiative, the election of the President of the Republic, the organisation of the legislative and regulative sphere, the conduct of foreign and European policy (including the place of the European Union in the Constitution). It also deals with other topics raised on the occasion of the visits by the delegation of the Venice Commission to Finland: basic rights and liberties, international relations in general, including the rank of international treaties and EU law, as well as the administration of (constitutional and ordinary) justice.

I. General remarks

8. In analysing a constitution, the wording of the constitutional provisions must be taken into account as well as the constitutional traditions and constitutional "culture" of the state, especially if they show a long and consistent pattern. Often states have different traditions with respect to the weight that they give to the case-law, constitutional practice, and the *travaux préparatoires* in both the interpretation and in "fleshing out" the wording of the constitution. The Finnish tradition, as is the case for all the Nordic countries, places great weight on the *travaux préparatoires* when interpreting the constitution. These are usually regarded as primary interpretative data, and are almost invariably followed by the courts. The Finnish constitutional tradition also heavily emphasises the continuity of development, and the role of practice of

parliament's Constitutional Committee.¹ Finally, the principle of treaty conform construction, by which parliament is presumed not to legislate in conflict with Finland's international obligations, is taken seriously by both the courts and the Constitutional Committee (see further paras 12, 15). These points must be borne in mind, amongst other things, when studying the text of the Finnish constitution.

II. Basic Rights and Liberties

9. The constitutional rights catalogue of a liberal democratic state should be interpreted in such a way as to avoid conflicts with the international human rights obligations accepted by the state. There are a number of ways in which this may be done. One is to strive for harmony in formulating the language of the two rights catalogues. This can also have the benefit of increasing the propensity of the courts and administrative agencies to have regard to the applicable case-law and general comments of international supervisory bodies. A state emerging from a period of authoritarian rule, with limited traditions of meaningful constitutional rights, and with a need to rapidly put into place a coherent catalogue of rights will find that a harmonised approach can be particularly useful. However, for a state with a relatively long democratic tradition, which emphasises continuity in constitutional development and which has a rights catalogue which, to a large extent, predates its acceptance of international obligations, a harmonised approach may be less appealing - nor may it be so practicable. Where a state, such as Finland, has ratified many human rights treaties, striving for complete harmony may involve inserting a very long and therefore confusing catalogue of rights in the constitution.² Even a harmonised or identical formulation between a constitution and a human rights treaty does not necessarily guarantee that the rights in question will be interpreted in the same way by the national courts and the relevant international supervisory body. It must be emphasised that international human rights treaties are almost invariably intended to set out minimum standards. States are permitted and even encouraged to provide more extensive rights in their constitutions, so long as these do not violate the minimum international standards. States are also entitled, within the margin of appreciation permitted to them by international bodies, to draw the balances between different competing rights which best suit their constitutional traditions and culture. For example, one state may emphasise freedom of information more heavily than another and the privacy of personal data correspondingly less – and still comply with its international obligations. If national constitutional obligations are worded in the same manner as international obligations there is then a risk of making what was intended to be a subsidiary system for protection of rights – the international treaties – into the primary system.

10. Nonetheless, respect for international human rights obligations must be ensured. It is vital that the constitution, or failing that, the constitutional culture of the state, firmly encourages national courts and administrative agencies to take full account of the interpretative case-law of international human rights bodies. This includes, for European states, the case-law of the European Court of Human Rights (EctHR) concerning the state in question as well as other states, insofar as this is relevant to the state in question.

11. There are undoubtedly differences in the wording of some of the rights set out in Chapter 2, and these same rights contained in human rights treaties that are binding on Finland. This is the case although the formulation of these constitutional rights was inspired by these very treaties.³ Differences exist for example as regards Section 6: Equality, Section 9: Freedom of movement, Section 10: The right to privacy, Section 11: Freedom of religion and conscience, Section 12: Freedom of expression and the right of access to information, Section 16: Educational rights and Section 17: Right to one's language and culture. Section 16 (right to education) is formulated as a right of access to education only, presuming the availability of

¹ See, e.g. M. Suksi, *Finlands Statsrätt*, Åbo, 2002.

² See also below, para. 15 regarding general clauses on limitation of rights.

³ See GrUB 25/1994 p. 3.

education. It does not, however, contain a reference to the free choice of education of a certain denomination or philosophy of life, let alone the right of parents to make such a choice and ensure the availability of education of their choice. In this way, Section 16 does not seem sufficiently to reflect the obligations under Article 2 of the First Protocol to the European Convention on Human Rights (ECHR) and Article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights. Sections 120 – 122 (Protection of national minorities - Self government and use of languages) only refer to cultural self-government in relation to the Sámi in their native region, raising the question whether these provisions properly cover Finland's obligations under the framework Convention on National Minorities. Section 23 (Basic rights and liberties in situations of emergency) does not list the basic rights and liberties that shall not be derogated from under any circumstances. It only refers, in a general way, to the international legal obligations of Finland.

12. If these differences give rise to a risk that the interpretation and application of these rights by national administrative agencies and courts fall below the minimum standards set by applicable human rights treaties, then this should be avoided. However, in the circumstances, the risk of such a result seems to be minimised by Articles 22 (protection of basic rights and liberties) and 74 (supervision of constitutionality by the Constitutional Law Committee) (below para. 121 ff). Article 22 provides that "all public authorities shall guarantee the observance of the basic rights and liberties *and human rights*" (our emphasis). This provision entails a duty not simply on the courts, the Ombudsman and administrative agencies to interpret into their application of statutes and other norms Finland's international human rights obligations,⁴ but also a duty on the Committee on the Constitution to take these international obligations into account when scrutinising draft legislation. Gaps, or tensions that might exist between these obligations and the literal wording of the constitutional provisions are thus to be filled and improved through the application of the principle of treaty conform construction, taking full account of the applicable international case-law. Such a provision, taken on its own, is insufficient, as in practice it may not be taken sufficiently seriously. However, the practice of the Committee, the Ombudsman and of the Finnish courts, indicates that this duty is not only on paper, but is a living element of constitutional practice.⁵

13. Another point should be noted regarding the relative constitutional rights (i.e. the majority of rights which are not framed in absolute terms). The permissible limits which may be made to them are not always made clear from the wording of the rights in question. Section 12 refers to "compelling reasons" for limiting freedom of expression without specifying in more detail what these are. In Section 13 (Freedom of assembly and freedom of association), there appears to be a tension between the first and the third sentence, as the right to hold meetings and demonstrations without a permit is formulated in an absolute way, while the third sentence provides for legal regulation of the exercise of that right by law. Moreover, there appears to be a problem in that an absolute freedom of demonstration may infringe upon the rights and freedoms of others and may lead to serious disruption of public order. The first sentence of Section 15 (protection of property) is formulated in too absolute a way, since it is obvious that

⁴ See the *travaux préparatoires* Grundlagsutskottets betänkande (Report of the Committee on the Constitution, GrUB) 25/1994 p. 5.

⁵ See, e.g. Ombudsman decision 1346/8.5.1989 (even before the Convention entered into force for Finland), 3170/2/01/31.12.2002, HD (Supreme Court) 1991:84, HD 2004:24, HD 2004:42, HD 2004:55, HD 2004:58, HD 2004:73, HD 2004:94, HD 2005:73, HD 2006:33, HFD (Supreme Administrative Court) 1998:13. See also M. Pellonpää, *Europeiska människorättskonventionen*, Helsinki, 2007, pp. 60-77. However, there can of course be occasional criticism by academic commentators of individual decisions, as to what the international obligations actually require in a concrete case. Moreover, there are occasional judgments from the European Court of Human Rights indicating that the Finnish courts have wrongly interpreted the Convention. See, e.g. *Kurhavaara v. Finland*, 16 November 2004. In such cases, the Finnish courts recognise a duty to correct the effects of judgments found to be in violation of the Convention. As noted further below, the office of Chancellor of Justice also has as part of its functions the monitoring of respect for human rights. For examples of interpretation in conformity with human rights obligations see the annual report for 2006, <http://www.chancellorofjustice.fi/index.html>.

expropriation is not the only ground on the basis of which property and the use thereof may be regulated by law. There is a lack of clarity regarding the permissible limits in both Section 19 (The right to social security) and Section 18 (The right to work and the freedom to engage in commercial activity). There is a lack of clarity regarding the permissible limits in both Section 19 (The right to social security) and Section 18 (The right to work and the freedom to engage in commercial activity).

14. Section 6 (equality) contains a list that does not present an exhaustive enumeration of discrimination grounds, but ends with the words "other reason that concerns his or her person". In Section 14 (electoral and participatory rights) the active right to vote is presented as a fundamental right, while the passive right to be eligible for membership of national representative bodies is only mentioned as a matter to be regulated by law. For municipal elections the eligibility for membership of municipal representative bodies is not even mentioned.

15. It is not necessary to have specific limitation clauses for each right: a general clause in a Constitution is obviously sufficient. However, here it is important to remember the constitutional culture. General limits do in fact exist, but these are set out in the *travaux préparatoires* to the Constitution, not in the Constitution itself. In the Finnish legal tradition, this guarantees that the limits will be taken into account, while retaining a degree of flexibility. In addition to the statement of the principle of treaty conform construction (which applies to all human rights obligations) the *travaux préparatoires* provide, in brief, that restrictions in basic rights should in general be in statute form, that the content of these restrictions should be set out as exactly and be as foreseeable as possible, that the reasons for making restrictions shall be acceptable in a democratic society, within the meaning of the ECtHR practice, that the essence of a right should not be impaired by a restriction, that any restriction be proportional to the end to be achieved, including suitability and least intrusive means and finally, that restrictions must be accompanied by adequate remedies.⁶ As long as these statements in the *travaux préparatoires* are faithfully and fully applied in practice by both the legislature when legislating, and the courts and the Ombudsman when interpreting legislation, then the Venice Commission considers that this is not incompatible with European standards. As the risk for a conflict is very limited in practice due to the interpretations given to general provisions on protection of basic rights and liberties and supervision of constitutionality (Articles 22 and 74) the present situation is acceptable. The Venice Commission nonetheless strongly urges that the Finnish parliament consider, in any future reform of Chapter II, whether these general limits may be set out in the text of the Constitution itself. Other countries have certainly found it possible to have a general limitation clause in the Constitution, which exhaustively sets out the limits for rights restrictions.⁷ Accepting the value of continuity of development, there is now over twelve years constitutional practice interpreting the limits in question which can be codified in a general limits clause. Moreover, if the Lisbon EU reform treaty enters into force, making *inter alia* the EU Charter on Fundamental Rights legally binding, the Finnish courts will already be faced with applying one general limitation clause (Article 52.1 of the Charter) when applying EU law within Finland.⁸ In those circumstances, the perceived benefits of a degree of flexibility (keeping the limits in the *travaux préparatoires*) may be less than the perceived benefits of visibility and coherence (between Finnish constitutional and EU rights). Ratification of the Lisbon treaty will thus provide the Finnish parliament with an opportunity to review this and other rights related issues.

⁶ See the *travaux préparatoires*, GrUB 25/1994 p. 5. See further V-P Viljanen, *Perusoikeuksien rajoitusedellytykset*, Helsinki, 2001 and M. Suksi, *Finlands Statsrätt*, Åbo, 2002 pp. 133-136.

⁷ E.g., Croatia, Canada.

⁸ It should, however, also be noted that Article 52.3 of the Charter incorporates the various specific limitation clauses of the ECHR.

III. Referendum and popular initiative (Section 53)

16. The note by the Ministry of Justice dated 12 March 2007 raised, among others, the issue of referendum and popular initiative. The strengthening of the existing national, voluntary and consultative referendum towards a decision-making referendum was indicated as one of the current debates. The option of allowing a referendum by civic initiative has also been raised. The issue of direct participation has been kept on the agenda without preparing any concrete proposals.

17. The role of direct democracy in contemporary parliamentary democracies is a complex question. Direct consultation of the people via a referendum has long been the subject of heated debates. Modern democracies are generally representative democracies, even if they include aspects of direct democracy. Regularly held general elections are the most common corrective mechanisms for the deficiencies of representative democracy. Nevertheless, most countries allow for some form of direct democracy in their constitutional system. There are only a few countries worldwide that have never held a nationwide referendum.⁹ But direct democracy is only complementary to representative democracy. For example, the Hungarian Constitutional Court declared that representation is the primary form of the exercise of sovereignty.¹⁰

18. Countries make use of the referendum instrument for different purposes and in different ways. Arguments in favour of a referendum include reference to the principle of popular sovereignty, to the necessity of asking the opinion and the consent of the 'people' on the most important issues during the period between elections. Democracy exercised by way of a referendum overcomes the size and space limitations of direct democracy: the people decide directly on certain issues without gathering together as in direct democracy.¹¹ It can also have the beneficial effect of overcoming voter apathy and re-engage voters with politics and democracy.

19. Opponents to referendum recall the negative experiences of history when plebiscite was used for justifying dictatorial ambitions. Referendum is regarded as a tool to undermine parliamentary democracy. Voters are not sufficiently informed, the decisions are based on partial knowledge, and often are not guided by rational arguments relating to the issues involved. The option or alternatives put to the voters are often too simplified or abstract to make a well-considered vote possible. Referenda are often used instead of deciding basic issues for short-sighted political purposes.¹²

20. However, it can be observed that there is a clear trend towards more direct democracy. This trend was initiated in 1948 by the United Nations Universal Declaration of Human Rights stating that "Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives" (Section 21).

21. In 2005, the Venice Commission adopted a comprehensive study based on the experience of 33 countries on Referenda in Europe – an Analysis of the Legal Rules in European States.¹³

⁹ Arjen Nijeboer, "Direct Democracy in the Netherlands." In *Direct Democracy in Europe: A Comprehensive Reference Guide to the Initiative and Referendum Process in Europe*. Eds. Bruno Kaufmann and M. Dane Waters. Carolina Academic Press, Durham, North Carolina. Sponsored by IRI Europe, Initiative and Referendum Institute Europe and IRI Initiative and Referendum Institute.

¹⁰ Judgment of the Hungarian Constitutional Court (CODICES HUN-1993-1-001) of 22-01-1993 no. 2/1993.

¹¹ See Giovanni Sartori, *The Theory of Democracy Revisited*. Chatham House Publisher: Chatham, New Jersey, 1987. 111.

¹² Walker, Mark Clarence, *The Strategic Use of Referenda. Power, Legitimacy and Democracy*. Palgrave, New York, 2003.

¹³ Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005) CDL-AD (2005)034. The tables

22. The nature of a referendum varies according to whether it is mandatory or optional, and depends on the body competent to call it.¹⁴ To hold a referendum might be mandatory (on certain well-defined issues as constitutional amendments) or optional. A referendum is *mandatory* when certain texts are automatically submitted to referendum, before or after their adoption (e.g. by Parliament). It is generally related to constitutional revisions.¹⁵

23. Certain referenda are held at the request of a public authority such as the Head of State, the Government, Parliament, a certain number of representatives. The initiative may also lay with citizens; referenda may be held at the request of a part of the electorate, but this is less common than mandatory referendum or referendum at the request of an authority.

24. Referenda at the request of part of the electorate must be divided into two categories: the *ordinary optional referendum* and the *popular initiative* in the narrow sense (when the referendum is initiated by the citizens, in other words citizens' initiative, including the abrogative referendum as practiced for example in Italy).¹⁶ An ordinary optional referendum challenges a text already approved by a state body, while a popular initiative enables part of the electorate to propose a text that has not yet been approved by any authority.

25. The effects of the referendum might be binding (decision-making) or non-binding. The non-binding referendum is a form of consultation with the voters. The Code of Good Practice on Referenda adopted by the Venice Commission in March 2007 when speaking of the effects of referenda¹⁷ suggested that the effects of legally binding or consultative referenda must be clearly specified in the Constitution or by law. Referenda on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.

26. As most Scandinavian countries, Finland had had for a long time no constitutional provision on referendum. In 1987 a constitutional amendment inserted a provision on the referendum. This provision pointed out some essential features to be regulated in the Act on referenda, and obliged the State to inform the voters of the alternatives and support the dissemination of information about them.¹⁸ Under this new procedure one referendum was held in 1994 on Finland's accession to the European Union (the majority voted in favour of it).

27. Section 53 of the Constitution of Finland regulates the referenda:

The decision to organise a consultative referendum is made by an Act, which shall contain provisions on the time of the referendum and on the choices to be presented to the voters.

Provisions concerning the conduct of a referendum are laid down by an Act.

28. Under the present regulation, referenda at all levels (national and local) are of a consultative nature. A national referendum can be called only by Parliament. The two national referenda held so far in Finland were regulated by special acts. Popular initiative at national

summarising the replies to the questionnaire on referenda by the Venice Commission appear in documents CDL-AD(2005)034add and CDL-AD(2005)034add2.

¹⁴ CDL-AD (2005)034, para. 22.

¹⁵ CDL-AD (2005)034, para. 23-24.

¹⁶ CDL-AD (2005)034, para. 39-40.

¹⁷ CDL-AD(2007)008, III.8., and para. 53-54 of the respective explanatory notes.

¹⁸ Section 22 as passed on 26 June 1987 said:

"Provisions for the holding of a consultative referendum shall be determined by Act of Parliament. The Act shall contain provisions on the date of the referendum and on the alternatives to be presented to the voters. The State shall inform the voters of the alternatives and support the dissemination of information about them as prescribed in the aforesaid Act. Provisions on the procedure to be applied in a consultative referendum shall be prescribed by Act of Parliament."

level does not exist in Finland. The present-day regulation in the Constitution is shorter than the previous one quoted above.

29. The study of the Venice Commission confirmed that national laws and practices related to referenda vary widely. Europe has democracies which are almost entirely representative, democracies which are (semi-)direct, and a number of intermediary forms. Referenda are sometimes seen as a political tool used by the executive branch of government, sometimes as an instrument used by groups of citizens to further their views outside traditional political party structures.¹⁹ Therefore, the present rather limited possibility of referendum in the Finnish Constitution is not against any European standard.

30. Enlarging the possibility of holding referenda or the introduction of a binding effect, or of a popular initiative is fully a political matter. It has to be taken into account, however, that in the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people in this peculiar form of direct democracy. Politicians and political parties would face serious difficulties when they had to explain such a withdrawal. Therefore, any widening in the regulation of referendum requires special cautiousness.

31. Scholars drew attention to the paradox that Scandinavian countries are among the world's most advanced democracies, placing high priority on such values as community participation, and grass-roots popular movements have important impact; while, paradoxically, referendum plays so minor a role.²⁰ Both politicians and political scientists underline that Scandinavian democracies operate in a consensual manner, based on the value of compromise. The majoritarian decision taken by referendum could contradict these values,²¹ if referenda were held only at the request of the authorities. If they could be asked by the opposition, be it through a parliamentary minority or through part of the electorate, the threat of a referendum could however lead to compromise.

32. If legislative acts providing for the calling of referenda were to be adopted, they should contain rules about the formulation of the questions (unity of content, clarity, and so on) submitted to the vote of the people.²²

33. In Finland, constitutional traditions strongly influence even the constitutional reforms. Taking into consideration the tradition of holding referenda only under exceptional circumstances, and on rare occasions, in the opinion of the Venice Commission revision of the present day regulation does not appear to be advisable. However, this is of course a political choice.

IV. The President of the Republic and its election (Sections 54ff)

1. Nature of the system of government instituted by the Constitution of 11 June 1999

1.1 Clearly a parliamentary system which could even be called quasi-rule by assembly

34. The Constitution is very clear on this point:

- under the terms of Section 2: "The powers of the State in Finland are vested in the people, who are represented by the Parliament.";

¹⁹ CDL-AD (2005)034, para 267.

²⁰ Vernan Bogdanor, "Scandinavia." In *Referenda around the world – the growing use of direct democracy*. Eds. David Butler and Austin Ranney. The American Enterprise Institute, Washington, DC, 1994. 69.

²¹ Bogdanor, *op. cit.* 78.

²² See the Code of Good Practice on Referenda, CDL-AD(2007)008, especially part III.

- the first chapter after Chapter 1 concerning the foundations of the state system and Chapter 2 on fundamental rights is a chapter dealing with Parliament;
- under the terms of Section 39, Representatives have a right to put forward budgetary motions enabling them to propose new expenditure;
- Section 43 allows a group of any twenty Representatives at any time to address an interpellation to the Government or to a Minister on a matter within their competence. This interpellation procedure ends in a vote which may bring down the Government. It is typical of the assembly-based system of government (cf. experience of the French Fourth Republic);
- under the terms of Section 61, it is the Parliament, not the President of the Republic, who appoints the Prime Minister. The appointment is made in two stages:
 - before the Prime Minister is elected, the parliamentary groups negotiate on the political programme and composition of the Government; the President merely informs the Parliament of the nominee for the office of Prime Minister;
 - the nominee must then be elected Prime Minister by obtaining more than half the votes cast in an open ballot.
 - the Prime Minister-elect is then appointed by the President of the Republic.
- under the terms of Section 90, Parliament exercises a high degree of control over the management of state finances and for this purpose is served by the independent State Audit Office and the Auditing Committee of the Parliament.

1.2 The powers of the President of the Republic are too limited for there to be any question of semi-presidential rule as for example in France

35. The situation was different before 1999, when the original solution of the Finnish constitutional system was defined as a semi-presidential dualist system – until 1958 the only European example of it.²³ The executive power was divided in a balanced way between President and government.²⁴ The unusually wide semi-presidential solution was not considered as a mixture of American-type presidential and European parliamentary system, but it was deeply rooted in the peculiar monarchic tradition.

36. In so far as the main aim of the 1999 constitutional reform was to enhance the parliamentary character of the political regime, this outcome can be considered amply achieved:

- The election of the Prime Minister and the formation of the Government by the Parliament are more akin to assembly-based than to parliamentary government;
- Parliament's powers have been considerably strengthened both in the legislative sphere and in international and European affairs;
- The role of the Prime Minister and the Government has been increased *vis-à-vis* the powers of the President of the Republic, which are very limited.

37. In particular, while under the former Constitution legislative power was exercised by Parliament in conjunction with the President of the Republic, and supreme executive power was vested in the President of the Republic (Section 2), presently *the legislative powers are exercised by Parliament, which also decides on State finances. The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of Parliament* (Section 3). According to Section 58, *"The President of the Republic makes decisions in Government on the basis of proposals for decisions put forward*

²³ Jean Blondel, "Dual Leadership in the Contemporary World." In Arend Lijphart (ed.), *Parliamentary versus Presidential Government*. Oxford University Press: Oxford, 1992. 165.

²⁴ Maurice Duverger, "A New Political System Model: Semi-Presidential Government." In Lijphart, *op. cit.*, 145.

by the Government". However, with some exceptions, the President is, in the final analysis, not bound by the proposals of the government (RP 1/1998 rd p. 48).

38. Admittedly the President of the Republic has three characteristics making this office resemble semi-presidential government:

- the President of the Republic is elected by direct universal suffrage for a term of six years, longer than the parliamentary term (four years), under an identical electoral system to that of France (stipulation of an absolute majority in the first round of voting; if no candidate has gained the absolute majority in the first round, only the top two candidates participate in the second round);
- the President of the Republic is not liable in respect of political acts apart from cases of high treason, or a crime against humanity (Section 113);
- the President of the Republic appoints a number of senior officials (Section 126), judges (Section 102) and military officers (Section 128).

39. However, the President's powers are strictly limited:

- The President of the Republic, under Section 58, may only take a decision on the basis of a proposal from the Government and may not amend the proposal, but only approve it or return it to the Government, which in that event has sole discretion as to the subsequent action in the matter;
- The only powers that the President of the Republic may exercise without the Government's proposal (which may be likened to the powers which the President of the French Republic may exercise without the endorsement of the Prime Minister and the responsible ministers) actually belong to Parliament or to the Prime Minister:
 - Appointment of the Government and the ministers - as mentioned, the Prime Minister is chosen and elected by Parliament, while ministers are appointed by the President of the Republic at the Prime Minister's proposal;
 - Organisation of extraordinary parliamentary elections - under Section 26, the President of the Republic may order the holding of extraordinary parliamentary elections only in response to a reasoned proposal by the Prime Minister after having heard the parliamentary groups;
 - There remain the presidential pardon, which the President grants after consulting the Supreme Court (Section 105), certain individual measures relating to private citizens (under conditions prescribed by law) and certain decisions concerning the Åland Islands.
- The Prime Minister, not the President of the Republic, chairs the plenary meetings of the Government Ministers (Section 66);
- The procedure for confirming Acts provided for by Section 77 only allows the President to return an Act to Parliament, possibly after submitting it to the Supreme Court or the Supreme Administrative Court. The President may not oppose the entry into force of an Act; if Parliament readopts it by simple majority, it comes into force without confirmation, and the opinion by the Supreme Court or the Supreme Administrative Court is not binding.
- Although the President of the Republic is Commander-in-Chief of the defence forces and appoints the officers (Section 128), Section 58 expressly stipulates that decisions relating to military command shall be made by the President of the Republic in conjunction with the Minister of Defence.

2. These general considerations should be referred to in examining the question of the election of the President of the Republic

40. The considerable limitation of presidential powers introduced by the new Constitution is not reflected in the manner in which the Head of State is elected. Originally, under the provisions of

the 1919 Constitution, a special college of electors composed of 300 members was empowered to elect the President. In four cases, the President was not elected by the Electoral College: the Parliament (*Eduskunta*) elected the first President in 1919 (Ståhlberg) and Paasikivi in 1946. Mannerheim in 1944 and Kekkonen in 1974 were elected by special laws. In 1987, the system of presidential election was amended, and the election of the President was changed into a combination of direct election and an electoral college. In 1991, by a further reform, a two-stage method of a direct popular election was introduced (Section 23). The text of the present Constitution repeats the same provisions (Section 54):

The President of the Republic is elected by a direct vote for a term of six years. The President shall be a native-born Finnish citizen. The same person may be elected President for no more than two consecutive terms of office.

41. Thus, two seemingly contradictory tendencies can be observed in the Constitution: on the one hand, the limitation of presidential powers, on the other hand, the popular election of the Head of State. This inconsistency is based on the presupposition that wider presidential powers require more legitimacy, and this is accomplished by popular vote.

42. Therefore, the question raised by the Ministry of Justice is whether or not the new Constitution's curtailment of the President of the Republic's powers should lead to reconsideration of this election by direct universal suffrage.

43. Even if direct or indirect election of the President of the Republic is a political choice, the question invites a reply in the negative, for three reasons:

- Experience proves that it is very difficult, not to say impossible, to countermand a system of election by direct universal suffrage. It would be difficult to explain to the Finnish citizens, who have elected their President of the Republic since 1991, that this power is to be withdrawn from them. No one will want to take the political responsibility for such a step.

The example of France is informative in this respect: the election of the President of the Republic by direct universal suffrage, introduced at General De Gaulle's behest in 1962, occasioned very strong antagonism. The majority of the political class, particularly the left-wing opposition, was extremely hostile to this reform. However, on regaining power in 1981, the left and especially President Mitterrand, who had nevertheless condemned this form of election as an ongoing *coup d'Etat*, never challenged it.

- Comparative law provides other examples of a President of the Republic elected by direct universal suffrage and vested with limited powers: Austria, Iceland and Ireland are also parliamentary regimes in which the President of the Republic, whose powers are slight, is elected by universal suffrage.
- In so far as one of the aims of the new Constitution was to modernise and merge the earlier constitutional texts, avoiding a break with Finland's constitutional tradition, it seems advisable to retain a President of the Republic elected by universal suffrage for a term of six years, dissociated from Parliament's election every four years, who even though the office now carries no more than limited powers, can perform a role of arbitration and safeguarding the Constitution in the event of political crisis. It is an assurance both of continuity and of flexibility in the institutions.

V. Organisation of the legislative and regulative sphere (Section 80)

44. The Constitution defines the legislative sphere very extensively:

- numerous sections of the Constitution defer to legislation to amplify their provisions, in a whole series of fields;

- in addition, Section 80 defines the legislative field as: "... the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts";
- the Constitution does not confer an independent regulative power on the Government, merely a delegated one: only if an Act has empowered it to do so, and within the limits fixed by such empowerment, can the Government proceed by decree.

45. Such a situation may ultimately have drawbacks for the effectiveness of administrative action. If the law goes into too much detail, whenever a given point is to be amended, it will be necessary to have an Act passed, which is a long, cumbersome procedure. To take a famous example, in France under the Fourth Republic a law established the number of stallions in the national studs! Such a situation may be harmful in the long run both for the executive, deprived of all ability to act quickly, and for Parliament, burdened with minor measures.

46. A thorough assessment should therefore be made of the current distribution of legislative and regulative business under the sway of the new Constitution, in order to verify that it does not carry such risks. Otherwise, it would be advisable for Parliament's Constitutional Law Committee to ensure that the various bills which it considers do indeed leave their implementing arrangements to be made by decrees.

VI. International relations - Conduct of foreign and European policy (Sections 93 ff)

47. This Section will begin by sketching out the division of competence between the President and the Government, before proceeding to the issue of parliamentary control, although the two issues are closely linked.

1. Division of competence between the President and the Government

48. The relevant provision on competence in the area of foreign policy issues is Section 93. According to its first paragraph, "The foreign policy of Finland is directed by the President of the Republic *in co-operation with* the Government". But, it is the Government which is "responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures" (2nd paragraph). In any case, the approval of Parliament is required for the acceptance of Finland's international obligations (ratification) and their denouncement, Parliament decides on the bringing into force of Finland's international obligations and participates in the national preparations of decisions to be made in the European Union.

1.1 Foreign policy in general

49. According to the *travaux préparatoires*, "foreign policy" includes such matters as bilateral negotiations, participation in multilateral conferences and decision-making in international organisations. The "co-operation" requirement means that, notwithstanding the primacy of the President in foreign policy, the President should not do anything significant against the wish of the Government²⁵. According to the *travaux préparatoires*, this is *inter alia* the case when "it is a question of important foreign policy decisions from Finland's side, or there are external initiatives which can have important consequences for Finland's internal affairs."

50. Historically, foreign policy was the almost exclusive preserve of the Finnish President. A strong feature of the new Constitution is its increased emphasis on parliamentarism, and Section 93.1 provides the clear link to parliamentary accountability (see also below). The

²⁵ Gr UB 10/1998, p. 24, see also Suksi, *op. cit.*

President's power to delegate treaty making power to administrative agencies is limited, and requires statutory authority. The insistence on co-operation with the Government can partly be explained by historical factors – the almost complete dominance of foreign policy during President Kekkonen's period in office – but also as a counter-balancing factor to the increased popular legitimacy the President obtained by the introduction of direct elections in 1994.

51. Read in conjunction with the *travaux préparatoires*, Section 93.1 is relatively clear. It would become even clearer as a result of constitutional practice. The fact that Government prepares presidential decisions (Section 58) means that the mechanism should be in place for ensuring that the Government is properly involved in all issues which it considers it should be involved in. However, much decision-making in foreign policy is of a less formal nature, not always requiring "decisions" within the meaning of Section 58. On the other hand, the President has no large staff of her/his own which can result in a risk of institutional "turf battles" with the Government. Moreover, the Government is fully in charge of (and so has full insight into) the execution of such decisions, as under Section 93.3, "the communication of important foreign policy positions to foreign States and international organisations is the responsibility of the Minister with competence in foreign affairs."

52. If the direct popular elections risked producing "maverick" presidents, then the significant role still granted to the President in foreign policy could be problematic. But there is no evidence of this. Even though the political parties have not totally dominated the election of the President, their influence, and the maturity of the Finnish voting public, seem to make a maverick president a relatively remote possibility, even if the public's trust in politicians waxes and wanes, and the election of a "populist" candidate cannot be excluded. Even if a candidate who is not supported by one or more of the largest Finnish parties is elected, the mechanisms which exist to ensure co-operation with the Government seem adequate to avoid major problems.

53. The fact remains that the President can have a considerable degree of autonomy in the field of foreign affairs, while at the same time, the Government is responsible to Parliament for the conduct of foreign affairs. This gives rise to the question of, *inter alia*, whether parliamentary insight into the work of the President/Government is adequate (dealt with below, par. 69 ff).

1.2 European Union issues

54. The division of foreign policy between Government and President is particularly important as regards the area of foreign policy where the President does not have primacy. In the specific area of EU affairs, Section 93.2 provides that "The Government is responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures ..."

55. This provision makes it clear that for EU States, the previous line between "foreign" and "internal" policy is no longer clear. The Finnish Constitution divides competences in the conduct of foreign policy based, not on the substance of the subject-matter, but on the context of the decision-making. In defining the area of governmental primacy by reference to an entity, the EU, whose competence is continually shifting/expanding, the framers of the Finnish Constitution have deliberately provided for a growing area of primary governmental competence in foreign policy. The growth of common positions and strategies in the EU common foreign and security policy (CFSP), e.g. as regards what has traditionally been a crucially important part of Finnish foreign policy, its relationship with Russia, means that issues previously regarded as purely bilateral will now be regarded, depending on the circumstances, as partially, largely, or wholly, within the Government's primacy.

56. This results in overlapping competences. Foreign policy issues do not come neatly labelled as being either within the CFSP or not. A need to take a CFSP initiative can arise rapidly, such

as the imposition of EU sanctions. Events can quickly lead to a CFSP initiative, binding the EU states, being taken in an area previously left free for bilateral relations.

57. The problem is not peculiar to Finland: it is interesting to note that in France, during the various periods of cohabitation between a President and a Government formed by a different majority from the one that elected the President (1986-88; 1993-95; 1997-2002), the principal sources of conflict between the President of the Republic and the Government concerned European affairs. These in fact come under domestic and foreign policy at the same time.

58. Traditionally, the value of “speaking with one voice” has been stressed in foreign policy.²⁶ If differences of opinion arise between the President and Government, and leak out to negotiating partners, this can make it more difficult to achieve a good deal for Finland, or undermine its credibility as a reliable partner. This applies in foreign policy generally. As regards EU and non-EU foreign policy, Finland’s credibility is also reduced if it says one thing in the context of the EU, but behaves differently in non-EU contexts. A less important consequence of the division between EU and non-EU foreign policy is that negotiating partners may be confused as to who they are negotiating with. In the EU context, the main negotiating partner is the Prime Minister, but if foreign partners perceive the President as superior to the Prime Minister, this can diminish the prestige (and so affect the bargaining power) of the latter. The President has, traditionally, attended the EU Council, even if Finland is represented by the Prime Minister.

59. It is evident that the participation of the President should be required when revisions or modifications of the European Treaties are in the agenda. Revisions or modifications of the European Treaties are part of the European policies. However, for the reason that they differ from the ordinary decisions of the European authorities, they require a parliamentary decision of acceptance (ratification) and are - at the same time - part of the foreign policies because they imply a redefinition of the place of Finland on the international scene. In some way the adoption of the European Treaties and their revision, as far as it precedes the development of the European policies, define the respective sphere of the European and of the foreign policies of Finland and - therefore - they directly interest the President of the Republic.

60. Another potential problem is that, as already mentioned, foreign policy issues may arise rapidly, necessitating a relatively quick reaction. Where the Constitution provides for overlapping competence, it will be necessary for the President and Government to consult extensively with each other, and reach compromises, something which will be assumed to delay decision-making. Furthermore, the overlapping competence could affect the willingness of the President or Government to take foreign policy initiatives in their respective areas of primacy, because they do not wish to interfere in each other’s spheres of competence. The increased need for consultation takes time and puts a strain on the working relationships between the Government and the President. If the Government wants to “remove” an issue from the President, it has the instrument to do so, by actively advocating (or supporting) a CFSP initiative in an area previously left for members states’ bilateral foreign policies, concerning something to which the President will obviously be very sensitive. If Parliament would like to say more on a foreign policy issue (below par. 69 ff) a relatively simple way to do this is to take an expansive approach to what is within the CFSP. An example of this is the views of the Committee on the Constitution on the issue of crisis management (54/2005). (Nevertheless, the Committee’s analysis that the constitutional solution reached was artificial is correct: CFSP decision-making is both dynamic and “multi-phased”).

²⁶ See, e.g., the classic remark from Alexis de Tocqueville, “*La politique extérieure n’exige l’usage de presque aucune des qualités qui sont propres à la démocratie, et commande au contraire le développement de presque toutes celles qui lui manquent*” A. Jardin (ed.) *Oeuvres complètes. T. 3, Écrits et discours politiques* (Gallimard, Paris, 1990), p. 238. See also L. Wildhaber, *Treaty-making power and constitution: an international and comparative study* (Helbing & Lichtenhahn, Basel/Stuttgart, 1971) p. 68.

61. As both the Finnish Government and Parliament have noted, the issue is particularly awkward with the advent of the “St Petersburg” tasks of EU crisis management in the EU “near area”. This provides for a further area of overlap, this time with the competence of the President as commander-in-chief of the defence forces (Section 128). It seems that military crises should be dealt with under the direction of the President when they fall in the area of international affairs. But the Government pretends to be competent when the EU is taking care of the management of the military crisis.

62. For example, in the European Council of Brussels meeting of 21-22 June, 2007, it was confirmed in Article 11 of the Treaty of the European Union that the competence of the Union in the field of foreign policy and of the common security regards all the sectors of the foreign policy and all the questions concerning the security of the Union (including the formation of a policy aimed at the establishment of a common defence).

63. How real, and if so, how serious are these problems? It is difficult to say. Each supposed problem can be countered by other points.

64. The “one voice” argument can be exaggerated. A system giving the President primacy in foreign affairs makes sense in a number of situations, where a value is perceived in presidential continuity and expertise. A strong presidential role in foreign policy is particularly useful where the electoral system or other factors tend to return unstable coalition governments. During President Kekkonen’s period in office, governments tended to be relatively unstable. However, this was arguably more a result of presidential influence than a lack of stability in Finnish politics. In any event, this has not been so since the 1980s. Nowadays, coalition governments sit out their full four year terms. Where the Government is stable, there is no reason for not involving it heavily in foreign policy matters, as is the case now. With broad coalition governments, the role played by the President in ensuring continuity in policies is also correspondingly much less today. The question thus is rather if the powers of the President should be reduced. Certainly, there are arguments in favour of this, in particular, the desire to ensure proper accountability for *all* decision-making to Parliament. On the other hand, having two centres of power both with their own source of democratic legitimacy need not be so problematic. The voting system means that the President is likely to come from one of the largest parties forming part of the coalition of Government, even if he/she comes from a different party than that of the Prime Minister. But even if there were no President, and Finland had a pure parliamentary system, then coalition governments would still be the norm. There may also be considerable differences of opinion in negotiating strategies or goals between ministers in a coalition government. As long as these differences of opinion are kept confidential from foreign powers, negotiating strategy will not be undermined.

65. Confusion has certainly arisen with foreign negotiating partners²⁷. However there is no evidence that the Finnish Prime Minister’s position has been undermined in practice.

66. As regards delays caused by consultation, the need for speedy decision-making can also be exaggerated. Having two centres of power indeed means that there will be sensitivity concerning measures regarded as being within one another’s sphere of competence. But where it is recognised that there is common competence – and it is clear that the President and Government recognise this, which encourages consultation and compromise. This is a positive result for a country the size of Finland, especially one where the goal of consensus in foreign policy has been an important part of the political culture. Consultation practices and compromises quickly emerged when the new Constitution entered into force. The solution thus is an institutional mechanism for consultation and co-operation and for resolving speedily, and confidentially, differences of opinion between President and Government. Such a mechanism is

²⁷ For example, the minutes of the European Council meeting in June 21-22, 2007 recorded Finland as being represented by its Head of State, not the Head of Government, Huvudstadsbladet, 25 June 2007.

already in place. Since March 2000, the Ministerial Committee on Foreign and Security Policy has been chaired by the Prime Minister, but the President closes the meeting and summarises the discussions.

67. A solution, as suggested by opinion 54/2005 of the Finnish Parliament's constitutional committee, would be to establish good co-operation between the President of the Republic and the Government on all foreign policy or defence matters. Here the best approach is to set up a structure – joint ministerial committee on foreign and security policy, defence council... – comprising the Prime Minister, the competent ministers (Ministers for Foreign Affairs, Home Affairs, Defence) and the President of the Republic. This body would have a general remit in respect of foreign policy. It would thus ensure the implementation of the co-operation provided for in the first paragraph of Section 93 of the Constitution. It would also have authority to consider all questions relating to the European Union's common foreign and security policy. The good co-operation which should result from the implementation of this new structure could lead to a "constitutional convention".

68. A more radical solution is to weaken the power of the Presidency, by constitutional amendment, e.g. by giving the Government the primacy also in general (non-EU) foreign affairs. There are several countries with presidents which play a largely ceremonial role. But bearing in mind the Finnish desire for continuity of constitutional change, this is presumably regarded as too radical. Moreover, the weakening of the President's position need not take the form of a constitutional amendment. It is likely to come about anyway, as a result of the expansion of natural development of the CFSP and the European Union itself. The question remains whether the restriction of the powers of the President by the enlargement of the scope of European Union policies (even without a formal revision of the treaties) is the best way to deal with the issue. The suitability of such a restriction of the powers of the President is not addressed here.

2. Parliamentary control

69. As already mentioned, the issue of *parliamentary control* is closely linked to the above issue, in that increasing governmental control will, with present parliamentary mechanisms, probably mean a strengthening of parliamentary control.

70. Globalisation and regionalisation mean that issues previously perceived by parliaments as being within domestic affairs, are now being, in practice, decided by international negotiations where there is often a lack of openness/transparency, limited or no possibility of participation through representatives chosen directly by the people, and a lack of accountability for the end result. It is often impossible to say whether better results have been achieved.²⁸ Imposing accountability is more difficult, as all participants will have an interest in reaching relatively ambiguous decisions, so limiting their political responsibility. Flexibility decreases as everything is based on a series of interlinked compromises. Finally, the distance between the voter and international problems is perceived as large.²⁹

71. At the same time, at least for EU states, parliaments can get more say over foreign policy issues which might previously have been regarded as a matter largely or wholly for the government. This is a result of the EC related foreign policy issues falling within existing parliamentary control mechanisms over EC law. For EU members, the growing legislative and supervisory powers of the directly elected European Parliament should also be borne in mind.

72. As with the issue of conduct of foreign policy, Finland applies a dual system concerning EU and non-EU foreign policy matters. Section 44 provides that "the Government may present a

²⁸ L. Stenelo, 'Samråd och tystnad i förhandlingsdemokrati', in, *Globalisering* SOU 1993:83, at p. 247.

²⁹ Stenelo *ibid.* p. 237, although the often-mentioned "CNN factor" may be shrinking this distance.

statement or report to Parliament on a matter relating to the governance of the country or its international relations". This is matched by Section 97.1 "The Foreign Affairs Committee of Parliament shall receive from the Government, upon request and when otherwise necessary, reports of matters pertaining to foreign and security policy". Under Section 93.1 Parliament accepts Finland's international obligations and their denouncement and decides on the bringing into force of Finland's international obligations in so far as provided in this Constitution. The President decides on matters of war and peace, with the consent of Parliament." Section 94 provides for four categories of agreement for which parliamentary consent is necessary before Finland approves a treaty, "treaties and other international obligations that contain provisions of a legislative nature" (meaning treaties which require legislation, or involve changes in statutes), treaties which are "otherwise significant" (meaning politically significant), treaties which "otherwise require approval by Parliament under this Constitution" (meaning concerning powers explicitly given to Parliament, such as to approve the budget) and the denouncement of such obligations. Special majorities (two thirds of the votes cast) apply for treaties concerning the Constitution or an alteration of the national borders. A limit is placed even on Parliament's power to approve a treaty (although it will be Parliament which decides whether this rule is applicable or not) in that an international obligation "shall not endanger the democratic foundations of the Constitution". Finland is a dualist State, and treaties falling within the legislative area are required to be in statute form (Section 95). Treaties falling within presidential authority can be brought into force by the President by decree.

73. The provisions for parliamentary control over treaties seem to be relatively strong, in practice stronger than in a number of parliamentary democracies, such as the UK. The mechanisms for control over treaties bear strong resemblances to the Swedish system which works satisfactorily.³⁰ However, foreign policy is not simply making treaties. Moreover, the parliamentary control over the President's conduct of foreign policy is indirect, through the mechanism of parliamentary accountability for the *Government*. There is thus scope for avoiding accountability. The Government can avoid accountability for certain decisions, by stressing the President's final say over the issue. It is difficult to see how this can be wholly avoided while retaining a system which remains semi-presidential under certain aspects. The risk will nonetheless be lessened if and to the extent that the Parliament, through the Foreign Affairs Committee, has access to the – obviously confidential – governmental proposals which would make plain whether the President diverged from the advice he/she received from the Government. The Foreign Affairs Committee has a duty of confidentiality (Section 50.3) – nor does a purely parliamentary system necessarily result in a greater degree of control over governmental conduct of foreign policy. The secrecy which surrounds, and necessarily must surround, certain aspects of foreign policy leads to dissatisfaction, whatever the system. For example, in Sweden, some critics have regarded the role of the Prime Minister, for a variety of reasons, including the EU Council practice of making package deals over ministerial areas of responsibility, as becoming increasingly "presidential" in foreign policy.

74. As regards the EU, under Section 93.2, the Government is responsible for the "national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures, unless the decision requires the approval of Parliament. Parliament participates in the national preparation of decisions to be made in the European Union, as provided in this Constitution." More detailed provisions are to be found in Sections 96 and 97.2.³¹ The question whether an issue "otherwise, according to the Constitution, would fall

³⁰ Swedish Parliamentary Participation in the Making and Implementation of Treaties, 74 *Nordic Journal of International Law* 429-483 (2005).

³¹ Section 96 provides that "The Parliament considers those proposals for acts, agreements and other measures which are to be decided in the European Union and which otherwise, according to the Constitution, would fall within the competence of the Parliament.

The Government shall, for the determination of the position of the Parliament, communicate a proposal referred to in paragraph (1) to the Parliament by a communication of the Government, without delay, after receiving notice of the proposal. The proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees

within the competence of the Parliament” (Section 96.1) is however not always easy to answer. The Finnish provisions provide for strong parliamentary control. The fact that the Grand Committee and the Foreign Affairs Committee usually receive the basis for EU decisions before they are taken allows it to influence Finnish Government policy, which in turn can influence the EU decision maker(s). The control exercised, and capable of being exercised, compares favourably to that of other countries, e.g. Sweden, where the equivalent EU Committee does not always have expertise in the material area of EU decision-making and is not capable of expressing the view of Parliament as a whole (as the Finnish committees are) (and so binding). In Sweden, the views of Parliament, if they are expressed at all, have thus often come too late to be able to influence the Government.

75. As a concluding remark on parliamentary control, if and to the extent that some Finnish parliamentarians feel that Parliament should have more insight into and more say about foreign policy, the insight and control role of Parliament is in any case likely to gradually grow with the expansion of the areas subject to the CFSP.

VII. International relations – Rank of international treaties and EU law – in particular in the field of human rights (Section 94 ff)

1. General framework

76. According to the first paragraph of *Section 94*, the acceptance of Parliament is required for treaties and other international obligations that contain provisions of a legislative nature or are otherwise significant. The acceptance (or the denouncement) is made by a majority of the votes cast.

77. It is somewhat unclear from the wording of this paragraph by what criteria a treaty or other international obligation is considered to be of a legislative nature or is otherwise significant, and thus requires approval by Parliament. However, a certain precision follows from the *travaux préparatoires* and the practice of the Constitutional Law Committee. Further, it must be remembered that a decision not to submit a treaty to Parliament is made under political accountability. Moreover, the requirement that all “significant” treaties be submitted serves to ensure that Parliamentary assent is sought in all appropriate cases. The Finnish Parliament has not, apparently, felt that these provisions have not functioned satisfactorily in practice. At any rate, it is more than suitable for the Parliament to be informed about all treaties subscribed by the Executive.

78. According to the second paragraph of *Section 94*, if the decision on the acceptance of an international obligation concerns the Constitution (or an alteration of the national borders) the decision shall be made by at least two thirds of the votes cast.

79. According to the first paragraph of *Section 95*, the provisions of treaties and other international obligations of a legislative nature are brought into force by an Act. A Government bill for bringing into force an international obligation is – according to the second paragraph of

that issue statements to the Grand Committee. However, the Foreign Affairs Committee considers a proposal pertaining to foreign and security policy. Where necessary, the Grand Committee or the Foreign Affairs Committee may issue to the Government a statement on the proposal. In addition, the Speaker's Council may decide that the matter be taken up for debate in plenary session, during which, however, no decision is made by the Parliament.

The Government shall provide the appropriate Committees with information on the consideration of the matter in the European Union. The Grand Committee or the Foreign Affairs Committee shall also be informed of the position of the Government on the matter.

Section 97.2 provides that “The Prime Minister shall provide the Parliament or a Committee with information on matters to be dealt with in a European Council beforehand and without delay after a meeting of the Council. The same applies when amendments are being prepared to the treaties establishing the European Union.

The appropriate Committee of the Parliament may issue a statement to the Government on the basis of the reports or information referred to above.”

Section 95 – considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution it must be adopted by Parliament – without leaving it in abeyance – by at least two thirds of the votes cast.

80. It follows from these provisions that international obligations/treaties of a legislative nature are brought into force in Finland by ordinary law – if the obligations/treaties concern the Constitution, by a law adopted by two thirds of the votes. This must mean that, within the Finnish legal system, these international obligations themselves also have the status of the law incorporating them.

2. Status of the European Convention on the Human Rights and other treaties in the field of human rights

81. According to the above-mentioned ratio, the European Convention on Human Rights, incorporated into Finnish law by an Act of Parliament, does not – in principle – have a higher hierarchical status than normal legislation.

82. However, the Constitutional Law Committee of the Parliament and the case-law of the Finnish Supreme Courts have recognised a basic principle of human rights friendly interpretation in relation to the application of the European Convention on Human Rights – and the case-law of the European Court of Human Rights - within the national legal system.

83. This principle of human rights friendly interpretation of the European Convention on Human Rights is also based on the presumed will of Parliament

84. The delegation of the Venice Commission that visited Finland for the preparation of the opinion was informed that the European Convention on Human Rights is of direct constitutional relevance as it defines the minimum standards of the basic rights and liberties in the Constitution. It was also informed that Parliament is constitutionally bound to respect all international human rights obligations.

85. This constitutional doctrine of primacy of treaties in the field of human rights is based in particular on an interpretation of Sections 22 and 74 of the Constitution and the *travaux préparatoires* connected to these provisions. According to Section 22 the public authorities shall guarantee the observance of basic rights and liberties and human rights. According to Section 74 the Constitutional Law Committee of the Parliament shall issue statements on the constitutionality of legislative proposals as well as on their relation to international human rights treaties. In the *travaux préparatoires* to Section 74 it is stated that the human rights conventions have an impact on the interpretation of the basic rights and liberties contained in the Constitution.

86. Further, according to Section 23 only provisional exceptions to basic rights and liberties which are compatible with Finland's international obligations may be provided by an Act, if they are deemed necessary in the case of an armed attack or if an Act declares the emergency so serious that it can be compared with an armed attack. Also this provision seems to imply primacy of treaties in the field of human rights over national (ordinary) legislation.

87. As a consequence, the Finnish judicial authorities may exercise judicial review in view of guaranteeing compliance with international obligations in the field of basic rights and liberties.

88. The Finnish doctrine on the status of the European Convention on Human Rights and other international human rights obligations in national law seems to represent an effective implementation of these obligations. Not only Parliament, but also the courts are responsible for securing that Finnish legislation is in accordance herewith. There seems not to be a clear need to clarify the status of the Convention and other international human rights obligations.

89. However, the inclusion of a provision in the Constitution stipulating expressly the primacy of international human rights obligations could be taken into consideration.

3. Rank of international treaties in general

90. As mentioned, within the Finnish legal system, international obligations/treaties have the status of the law incorporating them.

91. According to Section 94 Parliament's acceptance of treaties and other international obligations that contain provisions of a legislative nature is made by a majority of the votes cast. According to Section 95 the provisions of treaties and other international obligations of a legislative nature are brought into force by an Act adopted by a majority of the votes cast, in accordance with the ordinary legislative procedure in Section 72.

92. However, if the international obligation concerns/is in conflict with the Constitution according to Section 94, the acceptance of Parliament shall be made by at least two thirds of the votes cast and according to Section 95, the Act bringing the obligation into force must be adopted by Parliament without leaving it in abeyance, by at least two thirds of the votes cast.

93. Thus, Section 95 of the Constitution allows an Act bringing into force international obligations that are in conflict with the Constitution without amending the Constitution. Section 95 is based on the general provision in Section 73 of the Constitution.

94. According to Section 73 of the Constitution a proposal on the enactment, amendment or repeal of the Constitution or on the enactment of a limited derogation to the Constitution shall in the second reading be left in abeyance, by a majority of the votes, until the first parliamentary session following parliamentary elections – unless the proposal is declared urgent by a decision supported by at least five sixths of the votes cast. The proposal shall then be adopted by a decision supported by at least two thirds of the votes cast.

95. Thus, the Constitution generally allows adoption of Acts that are in conflict with the Constitution if the Acts are approved by the same procedure as is required for an amendment of the text of the Constitution.

96. But even though Section 95 seems to be based on Section 73, Section 95 is not only a special reflection of the model of derogation in Section 73. The procedure of adoption of Acts bringing into force international obligations which are in conflict with the Constitution according to Section 95 does not follow the procedure of adoption of laws in conflict with the Constitution according to Section 73 as far as Section 95 only requires that the proposal is supported by two thirds of the votes cast. According to the *travaux préparatoires* the entering into force of an international obligation cannot always await parliamentary elections.

97. This raises the question of the rank of an Act bringing into force international obligations that are in conflict with the Constitution, as well as the rank of an act of limited derogation according to Section 73.

98. However, it follows from the *travaux préparatoires* to Section 95 and Section 73 that such Acts are at the same hierarchical level as ordinary Acts of Parliament. The Act can be repealed or amended by an act adopted according to the normal procedure in Section 72 of the Constitution. Of course, if an amendment implies an extension of the conflict with the Constitution, the procedure in Section 95 or Section 73 of the Constitution must be followed.

99. This is also supported by the derogative nature of these acts (the Constitution is not amended).

4. The relationship between EU law and the Constitution

100. The Constitution contains no specific provisions on the relationship between EU law and Finnish law. The Constitution contains three provisions concerning the EU – Section 93, paragraph 2, Section 96 and Section 97 – which all deal with the Finnish participation in EU affairs.

101. Thus, the relationship between EU law and Finnish law is based on the general provisions in Section 94, Section 95 and Section 73.

102. As mentioned above, an Act bringing into force international obligations is at the same hierarchical level as ordinary Acts of Parliament. This is also the case in relation to an Act bringing into force international obligations that are in conflict with the Constitution in accordance with the procedure described in the second sentence of Section 95, paragraph 2, or an Act of limited derogation according to Section 73.

103. Therefore, it seems that from a Finnish constitutional law perspective, EU law including its direct effect and primacy is placed – at least in principle – at the same hierarchical level as ordinary Acts so that Acts bringing into force EU law can be amended by a ordinary Act of Parliament – unless the amendment implies (an extension of) a conflict with the Constitution. The doctrine established in the case-law of the Court of Justice concerning internal effect and priority on the other hand would seem to imply that EU law must be given priority over the Constitutions of the member States.

104. The hierarchical level of EU law seems not to be an obstacle to an effective implementation of EU matters in the domestic legal order. Even in case of a conflict between EU law and the Constitution, Parliament can implement the relevant EU measure. As mentioned above, Section 95 allows the adoption of an Act bringing into force an international obligation which is in conflict with the Constitution – by at least two thirds of the votes cast. According to Section 73 a limited derogation to the Constitution can be adopted following the procedure for amendment of the Constitution.

105. Even if an express provision in the Constitution confirming the primacy of EU law might be seen as useful in a country with a dualistic tradition, from the perspective of EU law, such a primacy over Finnish law follows directly from EU law.

106. Not least from a human rights perspective, there are strong arguments for not explicitly accepting the supremacy of EU law in the Constitution. It is precisely this question that has provoked the “Solange” case law of the German *Bundesverfassungsgericht*, the Italian *Corte Costituzionale* and the French *Conseil Constitutionnel*. In a crisis, some kind of a safety valve for principles that are at the core of the national democratic *ordre public* may be considered advisable, making it clear that the situation is one of a dialogue between equals – the national constitutional courts and the ECJ, rather than a hierarchical superior-subordinate relationship. Even outside of such a crisis situation, which all the courts are naturally anxious to avoid, national constitutional standards have important roles to play in the processes of negotiation and drafting of EU legislation. A *bona fide* argument from a state that a particular legislative solution is very problematic from a constitutional perspective can encourage a rethinking of the approach, or at least, exceptions to be made in the final version. This bargaining tool is much less strong if the national constitutional protections in question are anyway explicitly made subordinate to EU law.

VIII. Administration of justice

Section 27

107. From the third paragraph it ensues that members of other courts than the two highest courts are eligible as members of Parliament. Although this possibility does not violate any express rule of European or international law, it would lead to a combination of legislative and judicial power in one and the same person and might create doubt as to the objective impartiality of the judge concerned, especially in cases where he or she has to interpret and apply laws, in the adoption or amendment of which he or she has participated, putting even at stake the principle of the rule of law (see the Procola-judgment of the European Court of Human Rights).

Section 98: Courts of law

108. Since Finland has a separate system of administrative jurisdiction, the issue could be raised whether the Supreme Court, the Courts of Appeal and the District Courts should be called "general courts of law", as their jurisdiction is limited to civil (and commercial) and criminal law cases.

Section 99: Duties of the Supreme Court and the Supreme Administrative Court

109. The word "supervise" in the first sentence of the second paragraph could create the wrong impression that the highest courts may also intervene *proprio motu*, without an appeal having been lodged, in the administration of justice by the lower courts.

110. What has been said in relation to Section 77 applies to the second sentence of the second paragraph: if the highest courts participate in the drafting of law, this may raise doubts as to their objective impartiality when they are called upon to interpret and apply that law in a case before them (Procola).

Section 101: High Court of Impeachment

111. In view of the jurisdiction of the High Court of Impeachment and its composition (50% judges and 50% appointed by Parliament) it is recommended to fix the required quorum in this constitutional provision instead of delegating this issue to the legislature.

Section 102: Appointment of judges

112. Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in more detail in the Constitution. Special care has to be taken that appointment by the Executive – and possible involvement of Parliament - is always based on a nomination procedure in the hands of an independent and apolitical body. This is even more important if the constitutional review functions of the courts increase (see below para 118).

Section 103: The right of judges to remain in office for life time

113. For the same reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned.

Section 105: Presidential pardon

114. The court that has imposed the sanction should be consulted in the pardon procedure, either instead of the Supreme Court or by the Supreme Court before it gives its opinion.

IX. Constitutional and legal review

1. Judicial review of legislation (Section 106)

115. Although the Venice Commission has in the past emphasised the value of the adoption of a Kelsenian model of constitutional justice (i.e. a specialised constitutional court) this is clearly not mandatory. It is sufficient that the Finnish system guarantee in practice the protection of human rights. Access to judicial review must be open to all interested persons, that is to all persons potentially exposed to the danger of unlawful violations of their rights, and, on the other hand, the decisions of the competent judicial authorities must be capable of producing effects which comply with the principle of certainty of law. If these two requirements are satisfied, the Nordic model of judicial review of legislation, as applied in the Finnish Constitution, is certainly acceptable.

116. Section 106 of the Finnish Constitution provides that "if, in a matter being tried by a court of law, the application of an Act would be in *evident* conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution". It strictly connects the settlement of a conflict between the Constitution and a legislative Act with a judicial decision on a specific case: therefore, all persons affected in the enjoyment of their constitutional rights by an act of legislation are allowed to ask a judge for a decision on such a conflict. But, it is also evident that the effects of the judicial decision are limited to the case and to the persons who are interested in the case; the Constitution is silent about the general effects of the decision: Section 106 does not provide for an *erga omnes* effect. This silence is compatible with the choice of making the decision on the review of the legislation incidental to "a matter being tried by a court of law". However, in theory at least, the risk is not ensuring *erga omnes* effects which comply with the principle of certainty of law, since the Finnish system does not recognise the principle of *stare decisis*.

117. Here again, recourse to constitutional traditions and culture is important. Finnish judicial culture displays a strong respect for the case-law of the highest courts. The risk, in practice, that lower courts refuse to follow the case-law of the highest courts is very small. In the circumstances, the present system appears not to be problematic in this regard.

118. A question can, however, arise regarding the relationship between the prior review made by the Committee on the Constitution (see below, para. 121 ff) under sections 22 and 74 (and that of the Chancellor of Justice) and the *post hoc* review of the courts. The prior review is made in order to prevent unconstitutional legislation being passed in the first place. As already mentioned, the *travaux préparatoires* are very important tools for judicial interpretation and the opinions of the Committee on the Constitution in particular have a high status in the Finnish system. This high status can, however, cause difficulties in at least two situations. The first is if, for some reason, there is a high degree of political consensus in Parliament in general and the Committee on the Constitution in particular, for legislation which nonetheless can raise serious questions under the constitutional rights provisions of the Constitution. Of course, Parliament is the primary safeguarder of the Constitution, and the long, transparent and well-prepared Finnish legislative process should guarantee that this does not happen. Exceptionally, however, this may be the case. The degree of respect the courts have for the *travaux préparatoires* may mean that they simply accept the assessment made by the Committee on the Constitution that there are no constitutional problems. The second situation can be seen as a variant of the first, and concerns the special problems which exist in maintaining Finland's compliance with its international human rights obligations, in particular under the ECHR. The Committee on the Constitution takes into account the case-law of the EctHR in studying draft legislation. However, this case-law is extensive. It is easy to miss a case, especially a case concerning another state which nonetheless has implications for one's own state. Moreover, the production of new, important cases is constant. However exhaustive and well-made the analysis made by the

Committee on the Constitution at the time of drafting legislation, it cannot guard against Finnish law being seen as moving towards breaching the ECHR because of later cases. If the Finnish courts automatically follow the *travaux préparatoires*, which identify no constitutional difficulties with the legislation, in such cases they will not be performing their function of maintaining compatibility with Finland's human rights obligations. For both these reasons, it can be assumed that the amount of constitutional review – at a minimal level today – is likely to grow, albeit only modestly.

119. Another matter is the fact that the Supreme Court and the Supreme Administrative Court do not act in a judiciary but in an advisory capacity when consulted by the President of the Republic on an Act adopted by Parliament, before its confirmation by the President (Section 77.1 of the Constitution). They may be called to give an opinion about the constitutionality or legality of the legislative proposal, or on the conformity of the proposal with international law or European law *ex ante*, while at a later stage they may be called to judge on the same legal question *ex post* when applying the Act after its adoption in a case before them. If, and to the extent that, the advisory and judicial functions are seen as concerning “the same case”, then, in line with the case-law of the ECHR this will be problematic.³²

120. Moreover, the entrenchment of the Åland Islands autonomy, which is expressly covered by Section 75 of the Constitution, provides for the participation of the Supreme Court in the procedure aimed at organising the control of the Ålandic legislation: an Ålandic act - when it is presented to the President of the Republic - is submitted for an opinion to the Supreme Court which has to judge on its compliance (or not) with the division of legislative competence between the Åland legislative assembly and the Finnish Parliament. Even when following the generally accepted opinion that the Supreme Court expresses an authoritative interpretation of the question concerning the compliance with the division of legislative powers, the incompatibility between the judicial functions of the Supreme Court and its role in the control procedure of the Ålandic legislation must be underlined. This concern could be bypassed only by supporting the opinion that Section 106 does not concern the Ålandic legislative acts, but in this case there would be a flaw in the system of judicial review of legislation.

2. Other aspects of constitutional and legal review

Section 74: Supervision of constitutionality

121. Chapter 6 of the Constitution, dealing with legislation, contains Section 74 on supervision of constitutionality. According to this provision, “The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties”. From the wording of the provision it becomes evident that the *ex ante* review of draft legislation by the Constitutional Law Committee for its conformity with the Constitution also comprises review for its relation to international human rights treaties.

122. Section 106 dealing with constitutional review of legislation by the courts only refers to the Constitution, not to treaties. However, human rights treaties tend to be incorporated in the Finnish legal system by a “blanket” statute, giving them the status of an act.

123. Section 106 may create the impression that the Constitutional Law Committee may, and perhaps should give priority to the provisions of human rights treaties over the human rights provisions of the Constitution, if there is a conflict, but that the courts are not allowed to do so after the law has been adopted and entered into force. This is a difference between *ex ante*-review and *ex post*-review that would not seem to be justified and might be reconsidered.

³² See the Procola and Kleyn-judgments and the Sancilor-judgment concerning the Netherlands and French Council of State, respectively.

124. It is not clear from Section 74 what the status of the statements of the Constitutional Law Committee on constitutionality and relation to international human rights treaties is, and whether a special procedure for the adoption of the legislative proposal applies if the Constitutional Law Committee finds the proposal to be in violation of the Constitution or a treaty.

125. In addition there are other constitutional bodies with the function of constitutional review: the Chancellor of Justice and the Parliamentary Ombudsman. Their review will, of course, also and even mainly concern the human rights provisions of the Constitution. However, whether and to what extent they may also take into consideration human rights provisions of treaties that are not covered by the Constitution or have a broader scope of protection (including through treaty conform interpretation) is not clear.

Sections 108, 111 and 112: Duties of the Chancellor of Justice of the Government

126. The Constitution does not make it clear what powers the Chancellor has, and what happens exactly, if he or she finds an act of Government or the President or another public authority or person to be unlawful. However, the measures which may be taken under Section 112, the charges possible under Section 111 the procedure and the possible outcome are clarified by subordinate legislation and the *travaux préparatoires*.³³

127. The power of the Chancellor to ensure that “the courts of law ... obey the law”, as it is worded gives the impression of being in violation of the independence of the judiciary. Review of the legality of acts and decisions of a court lays with the higher court alone, in accordance with the constitutional system of division of jurisdiction. However, again, the *travaux préparatoires* (and Section 3.3 of the Constitution itself) clarify that what is meant here is mainly the function of receiving and investigating complaints directed against judges for having violated the provisions of the code of judicial procedure in relation to impartiality. The Chancellor is prohibited from interfering in any way with on-going cases and may not annul or appeal cases.³⁴

Sections 109, 111 and 112: Duties of the Parliamentary Ombudsman and Section 118: Official accountability

128. Similar questions are raised and not answered by the wording of Sections 109, 111 and 112, regarding the powers of the Ombudsman in case he or she finds an act to be unlawful, the measures which may be taken, before whom may he or she bring charges under Section 111, and how the legal review by the Ombudsman of decisions of the courts relates to the normal appeal system and the principle of independence of the judiciary. However, again these, as well as questions relating to Section 118 on official accountability (which court is/courts are competent in the case of unlawful public action and whether or not the Chancellor of Justice and the Parliamentary Ombudsman can act *proprio motu*) are also answered in statutes³⁵ and the *travaux préparatoires*.³⁶

³³ See the Act on the Chancellor of Justice, 2000/193 section 6.3 (English translation in annual reports, <http://www.chancellorofjustice.fi/>). The measures in question are primarily the power to request before the Supreme Court the reopening of cases where a person is serving a criminal sentence. See further Suksi, op. cit. p. 435.

³⁴ RP 1/1998, p. 166 and Suksi, op. cit, pp. 430-431.

³⁵ In particular, the Parliamentary ombudsman Act (14.3.2002/197)

<http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/legislation.htx> Lag om riksdagens.

³⁶ RP 1/1998, p. 165-166.

Conclusion

129. On the whole, the Finnish Constitution is in conformity with European standards of democracy, the rule of law and human rights. The main aim of the 1999 constitutional reform, which was to enhance the parliamentary character of the regime, can be considered amply achieved. The most important points considered in this opinion can be summarised as follows.

130. Even if some adjustments of the wording of the Constitution in the field of basic rights and liberties could be suitable, the interpretation constantly given to general provisions in this field and supervision of constitutionality is fully in conformity with international treaties and standards.

131. The status of the international treaties in the field of human rights is in practice higher than that of ordinary legislation. However, a rule stating such a supremacy would be welcome.

132. The Venice Commission would not suggest a revision of the rules concerning the powers and the election of the President of the Republic. Neither do new provisions on referenda appear necessary, but this is a political choice.

133. However, the preeminent role of the President of the Republic, respectively of the Prime Minister, in foreign and European policy, may lead to difficulties, since the separation between both fields may be far from clear. Institutionalisation of (already existing) mechanisms such as the co-operation of both heads of the executive in the Ministerial Committee on Foreign and Security Policy could be considered, as could the extension of Parliament's powers in the field of foreign and European policy.

134. The creation of a specialised constitutional court is not imposed by any European standard, as long as the Finnish system guarantees in practice the protection of human rights, even if it could be suitable to extend the judicial control of constitutionality beyond the cases of evident conflict with the Constitution.

135. Keeping in mind that the present practice and interpretation on some specific points (par. 15, 88, 105) comply with the European standards, the Venice Commission is conscious of the fact that the continuity of that practice may be challenged and suggests that the Finnish authorities envisage the introduction of new provisions expressly guaranteeing the respect of these standards.